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INDEX.

PAGE

Application for permission to file supplemental memorandum. 1

Supplemental memorandum 3

I. The effect of the failure of the United States to timely assert sovereign title to the river bed in controversy 3

II. What is really at stake in this case? 8

III. Does the case involve a Federal question? 9

IV. The assertion by Government counsel that the Federal allotment patents involved in the case of Oklahoma v. Texas, 258 U. S. 574, did not expressly cover any portion of the river bed 10

V. The assertion by Government counsel that Oklahoma has departed from the rule of State v. Nolegs 11

VI. The position of the State of Oklahoma with reference to the stipulation concerning which Mr. Justice FRANKFURTER made inquiry; and the stipulation concerning which Mr. Chief Justice VINSON made certain observations 13

AUTHORITIES CITED.

Brewer-Elliott Oil & Gas Company v. United States, 260 U. S. 77 . . . . . 5, 6, 12

City of Tulsa v. Commissioners of the Land Office, 101 P. (2d) 246 11

City of Tulsa v. Peacock, 74 P. (2d) 359 11

Hardin v. Jordan, 140 U. S. 371 5

Hardin v. Shedd, 190 U. S. 508 . . . . . 4, 5

Marshall Dental Manufacturing Co. v. Iowa, 266 U. S. 460 3

Oklahoma v. Texas, 258 U. S. 574 . . . . . 2, 10, 12

Okla. Stats. 1941, Title 64, Sec. 209 11

United States v. Hayes, 20 F. (2d) 873 12

United States v. Holt State Bank, 270 U. S. 55 9

United States v. Oregon, 295 U. S. 2 9

Wear v. Kansas, 245 U. S. 154 . . . . . 4, 5

SUPREME COURT OF THE UNITED STATES,
October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM.

Come now, the petitioners, the State of Oklahoma, and the Champlin Refining Company, and respectfully ask leave to file supplemental memorandum in the above entitled cause, presented herewith and hereto attached, and in support of such application, state:

That by reason of the importance of the public interest in the petitioner's cause, and that justice may be done, this application for permission to file supplemental memorandum should be allowed, in order that the questions of the members of the Court, upon oral argument, may be more fully answered and that the controlling decisions of this Court, which were not there noticed, may be noticed.

That said supplemental memorandum includes a discussion of,

(1) The effect of the failure of the United States to timely assert sovereign title to the river bed in controversy;

(2) What is really at stake in this case;

(3) The Federal question concerning which inquiry was made by Mr. Justice REED;

(4) The assertion by Government counsel that the Federal allotment patents involved in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, did not expressly cover any portion of the river bed;

(5) The assertion by Government counsel that Oklahoma has departed from the rule of *State* v. *Nolegs;* and,

(6) The position of the State of Oklahoma with reference to the stipulation (R., p. 34) concerning which Mr. Justice FRANKFURTER made inquiry, and the stipulation (R., p. 45) concerning which Mr. Chief Justice VINSON made certain observations.

That this application is not made for delay and counsel aver that petitioner's rights will be jeopardized in the event such application be denied.

Wherefore, petitioners pray that said application be allowed.

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J. WALKER FIELD,
Assistant Attorney General for the State of Oklahoma;

L. L. CORN,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;

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E. S. CHAMPLIN,
Attorneys for Champlin Refining Company.

SUPREME COURT OF THE UNITED STATES,
October Term, 1946.

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL MEMORANDUM.

I.

The Effect of the Failure of the United States to Timely Assert Sovereign Title to the River Bed in Controversy.

A complete answer to this question is found in the opinion of this Court in *Marshall Dental Mfg. Company* v. *Iowa*, 226 U. S. 460. In that case, the contest was wholly between the State of Iowa and private claimants, exactly as in the case at bar.

The Court, speaking through Mr. Justice HOLMES, held that it was unnecessary to decide whether the United States or the State of Iowa held superior title, because in any event the private riparian claimants were without title and that the State of Iowa "by virtue of its sovereignty" had sufficient interest in the bed of the water to enable it to resist the claim of the private riparian owners.

The pertinent language of the Court is as follows:

"By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of

the adjoining lake. (Citing cases.) *It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state.*

"The question as to the title to the bed is treated as open in *Hardin* v. *Shedd,* 190 U. S. 508, 519, • • • and *Whitaker* v. *McBride,* 197 U. S. 510, 515, • • • and there is not need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake *sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. The principle has been affirmed and acted on by the court so recently that it does not require further argument here.*"

The situation in the above cited case is identical with the case at bar and sustains the State's position unquestionably as against the claims of the Indian riparian owners.

The *Marshall Dental Mfg. Company* case is one of a trilogy of opinions written by Mr. Justice Holmes on this subject, the others being *Hardin* v. *Shedd,* 190 U. S. 508, and *Wear* v. *Kansas,* 245 U. S. 154. These cases reflect an underlying philosophy, *viz.,* that the beds of rivers which have not been conveyed to private persons, but which have remained a part of the public domain, should be preserved for the public benefit, whether navigable or non-navigable, and that if the United States does not elect to assert title to the bed in its sovereign capacity, then the title passes to the state as trustee for the public.

By this judicial interpretation, the beds of public waters are reserved for the public benefit through the trusteeship of the state—public property which would otherwise pass into private hands if it were not for the state's intervention.

In *Hardin* v. *Shedd,* the Court concludes that in the case of navigable rivers, the title passes to the state by virtue of its admission as a state, but in the case of the non-navigable stream, the title passes to the state by the process of excluding the private riparian owner.

In *Wear* v. *Kansas,* this interpretation was applied to preserve the title of the bed of the Kansas River to the public through the trusteeship of the State of Kansas, a public property which would have otherwise passed into private hands inasmuch as the Kansas River is concededly non-navigable.

Twenty years after the opinion in *Hardin* v. *Shedd,* that opinion was expressly affirmed by this Court in *Brewer-Elliott Oil & Gas Company* v. *United States,* 260 U. S. 77. Chief Justice TAFT, speaking for the Court in the opinion, adopted the reasoning of Mr. Justice HOLMES in the *Hardin* v. *Shedd* case, when he approved the practice of the states in retaining title to the beds of streams by recognizing them as navigable "when they are not actually so." The Court there approved this procedure as being a "convenient method of preserving (the states') control."

The prerogative of the states is not enlarged by the doctrine of these cases, because it is the right of the states to exclude private owners *by a direct rule of exclusion,* from the beds of waters which have remained part of the public domain.

For example, in *Hardin* v. *Jordan,* 140 U. S. 371, the Court noted that some of the thirteen original states retained title to the beds of certain public waters by an express law that the title of riparian owners should stop at the edge of such waters. These laws made no mention of navigability or non-navigability and it may therefore be

concluded that the right of Oklahoma to exclude private claimants from ownership of the bed of the Arkansas River does not depend upon it being navigable either in fact or in law.

Supporting this conclusion, we quote from *Brewer-Elliott Oil and Gas Company* v. *United States*, as follows:

> "* * * Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, *or by expressly denying a riparian title to the bed of a non-navigable stream*, was immaterial. In either view the result there would have been the same."

The emphasis in the oral argument upon navigability or non-navigability in view of the admitted fact that this litigation is wholly between private claimants and the State of Oklahoma, is wholly beside the point.

Furthermore, it must be remembered that if the Indian claimants are successful in this litigation in sustaining the position which they now hold, the public will entirely lose all right in the Arkansas River bed, as well as all other similarly owned river beds in Oklahoma and Kansas and such result will be in complete derogation of the interpretation of Mr. Justice Holmes in the cases just referred to. Such reversal of policy would come at a most inopportune time, in that it would mean that the bed of the Arkansas River is public property in Kansas, but as soon as the Oklahoma state line is reached, it becomes private property within that State.

Such far-reaching action should not be taken unless this Court is prepared to overrule Mr. Justice Holmes' cited opinions, as well as the principles of the many other cases cited in our brief and thereby over-turn the long-

established property rights which have come to be fully recognized in the states as they have entered the Union.

The United States, having failed to assert a sovereign claim to the river bed on July 13, 1943, when the complaint was filed in this cause, is now out definitely and the inquiries by Mr. Justice FRANKFURTER in these particulars but serve to clearly reveal that the present activity of the United States is but the activity of an ordinary trustee—not a sovereign trustee as denominated by Government counsel —engaged in asserting a private claim upon behalf of its wards, which we say is contrary to the public interest of the people of the State of Oklahoma.

The United States may conclude to abandon any interest which the public may have in these river beds, but the State of Oklahoma feels differently about the matter and is not to be catechized for doing so.

It is true that oil lies at the foundation of this law suit—and surely the public's superior interest in such valuable production against the claims of private owners, Indians or otherwise, should be safeguarded by the State and such has always been the public policy of the states of Kansas and Oklahoma.

Mr. Chief Justice TAFT understood the problem fully and but for the conveyance to the Osages of the north half of the Arkansas River bed at the very point here in controversy prior to statehood by the Federal Government, the judgment in the *Brewer-Elliott* case would have been for the State.

The State of Oklahoma bowed to the reasoning of that decision. That very reasoning, however, now sustains the claim of the State of Oklahoma to the south half of that same river bed and upon that reasoning the State relies.

II.

What Is Really at Stake in This Case?

This question by Mr. Justice JACKSON deserves an answer which must be largely outside the record.

The segments of the river bed opposite the four Indian allotments here in controversy, have been proved to be worthless in so far as the production of oil or gas may be concerned. Most of the river lots in the area have been sold by the Indians to white people and the only segments of the river bed which are now producing oil and gas are opposite the lands of such white people and their oil lessees. The title to such producing segments of the river bed are in issue in the cases now before the Supreme Court of the State of Oklahoma referred to on page 15 of the brief of petitioners.

If the Oklahoma Supreme Court be required to adopt the Government's theory of this case, then one of those producing segments of the river bed will become the property of a private family in California named Swearingen, and the other will become the property of a private family in Oklahoma named Oldham and their grantees. The oil leases upon these producing segments of the river bed will become the property of the Alladin Petroleum Corporation, a Corporation, and Phillips Petroleum Company, a Corporation, and their various assignees, and the royalties will be payable to the private families and their grantees above named.

Such facts certainly do not furnish a very inspiring reason for overturning the doctrine by which this Court, speaking through Mr. Justice HOLMES, adopted a judicial interpretation wholly designed to enable the states to preserve the beds of such rivers in the public.

III.

Does the Case Involve a Federal Question?

This inquiry by Mr. Justice REED requires further answer.

It is undoubtedly true, as this Court states in *United States* v. *Oregon*, 295 U. S. 2, and in *United States* v. *Holt State Bank*, 270 U. S. 55, that navigability presents a Federal question.

However, this statement is not determinative of the matter because this Court made it clear in *United States* v. *Oregon* that even though navigability is a Federal question, the United States has assented that the state law of navigability will still govern in all cases in which the United States is not, or its express grantees are not, asserting title. Therefore, as between a state and private claimants, the state law becomes the Federal law by the settled and long-recognized rule of assent and adoption of the United States.

Thus is harmonized the doctrine expressed in *Wear* v. *Kansas* and the long line of decisions cited in petitioner's brief at pp. 36-42 incl., with cases like *Brewer-Elliott Oil & Gas Company* v. *United States* and *United States* v. *Oregon*, in which this court declined to apply the state law in cases in which the United States or its express grantees were asserting title. The latter line of cases is the exception to the general rule and must be read accordingly.

The portion of the opinion in *United States* v. *Oregon* (295 U. S., at p. 28) that supports the above conclusion, reads as follows:

> "The construction of grants by the United States is a Federal, not a state, question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law*

that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*"

IV.

The assertion by Government counsel that the Federal allotment patents involved in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, did not expressly cover any portion of the river bed.

This statement requires considerable clarification.

The United States in 1867 *expressly granted* the north half of the Red River bed to the "middle of the main channel" to the Comanche, Apache and Kiowa tribes and such portion of the river bed therefore became a part of tribal lands. This 1867 grant to the "middle of the main channel" lost the *Red River* case to the State of Oklahoma. Certainly no such grant to the south half of the Arkansas River bed is in the present case.

In 1900 Congress authorized the Red River tribal lands to be divided in severalty and upon authority of that act, the Federal allotment patents were issued to the individual members of the tribe.

While it is true that these individual patents did not expressly cover the river bed, it is also true that the north half of the river bed was no longer public domain by reason of the prior express grant to the tribes in 1867. This is the reason and the only reason, that this Court declined to apply the Oklahoma rule of property in that case.

Government counsel intimated that this Court intended to reverse *Wear* v. *Kansas* by its decision in *Oklahoma* v. *Texas*. This cannot be true, *first*, because that decision was handed down within a few months of the decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, and in the latter decision *Wear* v. *Kansas* was expressly recognized; and, *secondly*, in *Oklahoma* v. *Texas*, this Court reiterated the general rule that the state law governs in all cases in which the United States has not attempted to retain or expressly convey river bed lands.

V.

The Assertion by Government Counsel that Oklahoma Has Departed From the Rule of *State* v. *Nolegs*.

That the above assertion is entirely unfounded, is shown by the facts, (*1*) that the case of *State* v. *Nolegs* has never been reversed or modified; (*2*) that it has been reinforced by a State statute (Okla. Stat. 1941, Title 64, Sec. 209); and (*3*) that in two recent cases the Supreme Court of Oklahoma has assumed that the title to the bed of the Arkansas River is in the state (*City of Tulsa* v. *Commissioners of the Land Office*, 101 P. (2d) 246; *City of Tulsa* v. *Peacock*, 74 P. (2d) 359).

The only portions of the Arkansas River bed to which the State of Oklahoma has relinquished title are those portions which were expressly conveyed to Indian tribes prior to statehood, to-wit, the south half of the river bed along the Osage reservation and the entire river bed through the original Creek grant.

The people of Oklahoma feel that they have already been severely penalized by these conveyances of its public streams, but they recognize that it was doubtless thought necessary and proper that such conveyances be made at

the time, and they further recognize that those portions of the beds of its rivers which were thus conveyed to Indian Tribes and which have now become the property of private individuals, are lost both to the State and to the United States beyond recall. Oklahoma, however, did not give up those portions of its river beds without a struggle. It is true (as the Government states in its brief) that Oklahoma has three times attempted to assert title to the beds of rivers which were expressly granted by the Federal Government to Indian Tribes prior to statehood.

In *Brewer-Elliott Oil & Gas Company* v. *United States*, 260 U. S. 77, it attempted to assert title to the north half of the bed of the Arkansas River which had been expressly granted to the Osages prior to statehood.

In *United States* v. *Hayes*, 20 F. (2d) 873, it attempted to assert title to that portion of the bed of the Arkansas River which had expressly been granted to the Creek tribe prior to statehood.

In *Oklahoma* v. *Texas*, 258 U. S. 547, it attempted to assert title to the bed of the Red River, the north half of which had been expressly granted to the Comanche and Apache Tribes prior to statehood, while the south half of which had been expressly reserved by the United States in its sovereign capacity.

In all of those cases, the claim of the State of Oklahoma was defeated, not because this Court had deviated from the rule in *Wear* v. *Kansas*, but merely because the portions of the river beds involved in those cases had been either expressly conveyed to Indian Tribes prior to statehood or had been reserved by the United States in its sovereign capacity.

The present case, however, goes far beyond the cases above cited. The portion of the river bed involved in this

action was never the property of the Indians who are the claimants in this action and was never the tribal property of the tribes to which they belong. Furthermore, the United States is not claiming the river bed for itself.

Hence, the status of the portion of the river bed involved in the present action is exactly the same as the status of the bed of this same Arkansas River within the State of Kansas, the title to which has been judicially awarded to the State of Kansas by this Court.

The State of Oklahoma in this action is merely attempting to preserve for its people the same rights to the remaining portions of its public river beds, which the State of Kansas and its other sister states have received (as a matter of course) in *all* of their public rivers.

VI.

The position of the State of Oklahoma with reference to the stipulation (R., p. 34) concerning which Mr. Justice Frankfurter made inquiry; and the stipulation (R., p. 45) concerning which Mr. Chief Justice Vinson made certain observations.

The stipulation at page 34 of the record was entered into at the request of the Government.

It was the intention of the parties that if the Indian claimants should be unsuccessful in the present action, the United States might later bring suit to assert title in its sovereign capacity without being met by a plea of *res adjudicata*. It should in this connection be observed that if the Indian claimants be successful, then the United States, as well as the State of Oklahoma, will be without the right to claim any interest in such river bed.

For the State's position, if future litigation should arise between the State and the United States in its sov-

ereign capacity, we wish to say that the State recognizes that if the United States in its sovereign capacity had made timely claim to the bed of the Arkansas River here in controversy, such claim upon the authority of *United States* v. *Oregon* would have been well founded. However, that same case shows that the Federal Government may abandon title to a river bed, and it would be the position of the State of Oklahoma, if such future litigation should arise, that the United States has abandoned any claim of title to the river bed here in controversy.

As to the stipulation (R., p. 45) the parties were merely seeking to avoid the accumulation of evidence upon a proposition which was deemed not material as a matter of law.

Respectfully submitted,

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